Sections 123(1), 110(1) and 124(4) of the Ordinance have been replaced by sections 127(1), 114(1) and 128(4) of the Act respectively.

In that case it was held that

"where a vehicle used in the commission of an offence had been seized by a Customs Officer under section 110 of the Customs Ordinance 1952 and if it is proved to the satisfaction of the court that the vehicle had been so used, section 123 of the said Ordinance gave no discretion to the court, but render an order for forfeiture mandatory."

In the course of the judgment, Good J. also considered the question whether "goods" includes a vehicle used for the carriage of goods in the commission of the offence against the Ordinance. He referred to section 2(1) of the Ordinance which defines "goods" (similarly defined under section 2(1) of the Act) to include "animals, birds, fish, plants and all kinds of movable property;" and went on to say that "goods" in the context of section 123 clearly does not exclude receptacles, packages, conveyances, vessels and aircraft. In the determination of the questions before us we have to consider whether "goods" in the context of section 128(4) excludes receptacles, packages, conveyances, etc. We think not. The law is clear in that "goods" referred to in that section refers to goods seized pursuant to section 114 of the Act and which evidently includes receptacles, packages, conveyances, etc.

It is true that in *Ng Hee Weng's* case the question of forfeiture arose consequent upon a conviction. Nonetheless there was clear provisions under section 123 of the Ordinance (section 127 of the Act) to the effect that an order shall be made notwithstanding that no person may have been convicted of an offence, i.e. an offence against the Ordinance or any regulations made thereunder. The fundamental question that calls for determination is whether there is proof to the satisfaction of the court that an offence against the Ordinance (similarly the Act) has been committed and whether the goods are the subject matter of the offence or, if it is a vehicle, whether it is used in the commission of such offence. In our view the distinction that emerges, upon construction of the effects of sections 127(1) and 128(4) of the Act, is essentially in regard to procedure. If there be no prosecution with regard to goods seized under the Act and there is a claim made to any such goods before the expiration of one calendar month from the date of seizure, the court shall, consequent upon the issue of summons requiring the appearance of the person asserting that he is the owner of the goods and the person from whom they were seized, examine the matter and on proof that an offence against the Act has been committed and that either (a) such goods were the subject matter, or, (b) if it was a vehicle, it was used in the commission of such offence before it, make an order for forfeiture.

On an enquiry pursuant to section 128(4) of the Act, the court shall examine all the evidence produced before it including that which may be tendered by the claimant in order to satisfy itself there is such proof. The court is competent in determining the matter before it to draw inferences from the facts proved. Proof on any other elements required to constitute an offence against the Act, such as knowledge or intent, is strictly a matter of inference to be deduced from the facts and circumstances surrounding each particular case where no presumption can properly be invoked.

If the court is satisfied after considering the whole of the materials before it that an offence against the Act has been committed and that the goods were the subject matter or the vehicle was used in the commission of such an offence, then, in that event, and not otherwise, it is mandatory for the court to make an order for forfeiture. It is our considered view that that is indeed the intention of the legislature underlying section 128(4) of the Act. In an appropriate case the court must give effect to the manifest intention of the legislature.

The question of the shifting of the onus of proof does not in the light of what we have stated earlier arise.

Order accordingly.

Solicitors: *Shook Lin & Bok.*

CHIN TECK PLANTATIONS BHD. v. KETUA PENGARAH HASIL DALAM NEGERI

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. & Abdoolcader J.) May 25, 26 & July 3, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 137 of 1981]

Revenue Law — Income Tax — Land alienated to company for planting oil palms — Timber on land to be extracted — Company assessed with income tax in respect of proceeds of sale of timber logs — Whether sale of timber rights — Adventure in nature of trade — Whether deduction to be made for price of land.

In this case land had been alienated to the appellant for the purpose of planting oil palms and it was a condition that all timber of commercial value on the land should be extracted. The appellant entered into an agreement with another person to cut down and remove the timber. The appellant was assessed to income tax in respect of the proceeds of sale of the timber logs. On appeal the Special Commissioners found that the purpose of the appellant's purchase of land was to sell timber logs and to plant oil palms. Consequently they held that the proceeds of sale of timber were gains derived from an adventure in the nature of trade and thus assessable. On appeal to the High Court counsel for the appellant submitted that the proceeds were capital receipts because the transaction out of which the sum was derived was a mere disposal of part of its capital by the appellant. It was also argued (a) that what was sold was timber rights because extraction of logs was done at the expense of the buyer, the purpose of sale being to prepare land for oil palm planting; (b) that the extraction of timber logs was done in compliance with the conditions of title to the land. It was finally argued that if the proceeds of sale were held to be revenue receipts, the appellant was entitled to deduct from such proceeds the price which it paid for the land.

The High Court held: (1) the Special Commissioners had found as a fact that the purpose of the appellants' acquiring the land was two fold namely to sell timber logs and equally to plant oil palms. It was on this basic finding that they concluded that the sale of the timber logs was a business transaction and as such the appellant was carrying on a concern in the nature of trade. Unless it could be shown that there was no evidence on which the Commissioners could make such finding, the High Court could not interfere;

(2) in this case the agreement with the buyer was for the purchase and sale of severed timber logs and not of timber

rights and as the land was acquired for selling timber, the proceeds from the sale of timber were revenue assets;

(3) as the Commissioners had correctly found that the purpose of the appellant's acquiring the land was to sell timber logs and to plant oil palms, the sale of timber logs was an adventure in the nature of trade and the gain derived from the transaction is not a capital receipt but a revenue receipt subject to taxation;

(4) the Special Commissioners were correct in holding that the price of the land was not revenue expenditure which could be debited against revenue receipt in order to arrive at the taxable profit, but a capital expenditure which is represented by the assets, that is, land.

The appellant appealed to the Federal Court. It was argued that the learned Judge erred in law in holding (a) that the more prominent purpose of the acquisition of the land was logging and not the planting of oil palm; (b) that the sale of timber rights by the appellant was not a sale of its capital assets; (c) that what the appellant sold were logs and not the right to extract the timber and (d) that the sale only took place after the timber was severed. In the alternative it was argued that the Judge erred in law in not allowing the sum of $500,000 paid to the Sultan of Pahang as a deduction as exclusively paid in the production of the income.

Held: (1) in this case the Special Commissioners had proceeded rightly to determine what was essentially a question of fact and upon such premises formed a conclusion of law. The learned judge quite rightly said that unless the Commissioner's finding was perverse and was not supported by the evidence, the court should be reluctant to interfere with it. The learned Judge observed that the appeal before him raised no question of law at all but rather concerned the application of existing principles to particular facts as found by the Special Commissioners;

(2) the grounds of appeal raised are essentially on questions of fact. There was no substance in the appellant's argument that the conclusions arrived at by the Special Commissioners were not warranted by the evidence or that the Commissioners had no evidence to infer that the land purchased was for selling timber and for planting oil palm; in any event it is not the function of the appeal court to substitute its conclusions of fact for those of the Special Commissioners whose duty it is to determine the facts unless the court is satisfied they are wrong. In this case there were no grounds to warrant the interference of the appellate court;

(3) there was no question in this case of any lease of the area to the buyer and no question of possession of the land not even proprietory rights in timber which can be described as a sort of interest in and possession of land. It was plain and simple a sale of timber transaction which was in fact an adventure in the nature of trade. There was therefore no question of a disposal of any part or at all of capital assets. The question of the proceeds being capital could not arise;

(4) the appellant could not successfully argue that the sum of $500,000 paid was not payment for the use of the license or permit to extract timber within the meaning of section 39(1)(g) of the Income Tax Act, 1967 and therefore the sum paid should not be allowed as deduction.

Cases referred to:-

(1) *Kauri Timber Co. Ltd.* v. *Commissioner of Taxes* [1913] A.C. 771.

(2) *Sekong Rubber Estate* v. *Ketua Pengarah Hasil Dalam Negeri* [1981] 2 M.L.J.

(3) *Thomson* v. *Deputy Federal Commissioners of Taxation* (1929) 43 C.L.R. 360.

(4) *Hood Bros.* v. *C.I.R.* (1955) 37 T.C. 188.

(5) *Murray* v. *C.I.R.* (1915) 32 T.C. 238.

(6) *Hopwood* v. *Spencer* (1964) 42 T.C. 169.

(7) *C.I.R.* v. *Pilcher* (1949) 31 T.C. 314.

(8) *River Estates Sdn. Bhd.* v. *Director-General of Inland Revenue* [1981] 1 M.L.J. 99.

(9) *Evans* v. *The Deputy Commissioner of Taxation for South Australia* (1936) 55 C.L.R. 80.

(10) *James Jones & Sons Ltd.* v. *Earl of Tankerville* [1909] 2 Ch. 440.

(11) *Whitfords Beach Pty. Ltd.* v. *Federal Commissioner of Taxation* (1979-80) 28 Australian L.R. 637.

(12) *Director-General of Inland Revenue* v. *Lahad Datu Timber Sdn. Bhd.* [1978] 1 M.L.J. 203.

(13) *Director-General of Inland Revenue* v. *L.T.S.* [1974] 1 M.L.J. 187.

(14) *Lahad Datu Timber Sendirian Berhad* v. *Director-General of Inland Revenue* [1981] 2 M.L.J. 97.

HIGH COURT.

J. Puthucheary for the appellant.

Mokhtar bin Haji Sidin (Senior Federal Counsel) for the respondent.

Salleh Abas F.J.: The appellant is a company incorporated on August 14, 1958 and turned public on November 28, 1968. The main objects of the appellant as stated in its memorandum are: —

"(a) to carry on the business of planters, cultivators, receivers and buyers of rubber and every kind of produce of soil to prepare manufacture and render marketable any such produce, and to sell dispose of and deal in any such produce, either in its prepared manufactured or raw state and either by wholesale or retail.

(b) To work with and deal with any mineral or other substances or timber, and to carry on business as farmers, miners, merchants, shipowners, general storekeepers and brokers and any other trade and business."

Under a series of three sale agreements between March 5, 1973 and January 12, 1975 the appellant purchased an area of 10,000 acres of jungle land in Keratong, Pekan, Pahang with valuable timber on it for a total consideration of $1,800,000; and became its registered owner on July 2, 1976.

The first agreement was signed on March 5, 1973 between the late H.H. the Sultan and his son YAM Tengku Ibrahim on the one part and Negeri Sembilan Oil Palms Berhad on the other part. Under this agreement the latter purchased the land and all right pertaining thereto for a sum of $2,000,000 if the title to be issued in respect thereof was freehold, otherwise for a sum of $1,800,000. Payment of the price was to be made according to an agreed schedule. However, some four years before this agreement was signed, the late H.H. the Sultan on receiving the alienation approval of the land from the State Government, had by an agreement dated November 11, 1968 already transferred all his rights and interests in respect of 7,000 acres of the alienated area to his son, YAM Tengku Ibrahim and retained for himself the remaining 3,000 acres. Because of this transfer YAM Tengku Ibrahim joined his late father as a party in the sale agreement. YAM Tengku Ibrahim carried on logging operations in the area transferred to him and by the time he and his late father signed the first sale agreement on March 5, 1973 the total area worked by him was 6,976 acres. The sale agreement required him to stop the logging operations forthwith subject, however, to his right to remove logs fallen prior to the date of the agreement.

The second agreement was entered into by the same parties three months after the first agreement, i.e. June 11, 1973. This agreement stipulated that when the title would in due course be issued by the State Government, it would be transferred directly to the appellant, which is an associate company of the Negeri Sembilan Oil Palms Berhad.

Presumably because of the demise of the late H.H. the Sultan, and the need to connect the appellant with the deal the third agreement was entered into on January 12, 1975 although this was between the present H.H. the Sultan and the appellant. The present H.H. the Sultan acted as the successor to his late father whereas the appellant acted as the principal purchaser, on whose behalf and for whose benefits the earlier two sale agreements were entered into by the Negeri Sembilan Oil Palms Berhad. Under the third agreement the present H.H. the Sultan as the successor to his late father in consideration of a further sum of $500,000 agreed to comply with two earlier agreements and to facilitate in the issuing of two forest licences:

"the KSK licence containing 6,976 acres of the said land *to enable the said company (appellant) to carry out extraction of logs the sale proceeds of which* shall be retained by the said company (appellant)"; another licence "containing 3,024 acres of virgin forest over the said land *to enable the said company (appellant) to extract logs over* the said area over a period of 2 or 3 years."

No forest licence was issued at all to the appellant. The licence in respect of 6,976 acres issued on July 1, 1975 was given in the name of the present H.H. the Sultan. The appellant did not itself extract the logs but he instead sold them for a sum of $540,000 to Koh Tong Leong Sdn. Bhd. In the logs sale agreement signed on June 16, 1975 the appellant is stated to have sold and the buyer to have purchased "all the logs including hardwood, medium hardwood and light hardwood" in the 6,976 acres of KSK area to be felled cut and removed from the area at the expense of the buyer.

On April 19, 1976 qualified title for the land was issued to the present H.H. the Sultan and his brother YAM Tengku Ibrahim, and on July 2, 1976 it was transferred to and registered in the name of the appellant. The title is a ninety-nine year lease with effect from April 19, 1976 and subject to the following express conditions: —

"(i) that the land is alienated solely for the purpose of planting oil palms;

(ii) that the palms should be planted according to an approved schedule and thereafter to the satisfaction of the Pahang State Agriculture Officer; and

(iii) all timber of commercial value on the land shall first be extracted according to an approved schedule and with the written approval of the Pahang State Forest Officer."

The appellant was assessed with income tax in respect of $540,000 proceeds of the sale of timber logs in the 6,976 KSK area. On appeal to the Special Commissioners, they found that the purpose of the appellant's purchase of land was to sell timber logs and to plant oil palms. Consequently they held that the proceeds of sale of timber are gains derived from an adventure in the nature of trade and thus assessable. Counsel for the appellant submitted that the proceeds are capital receipt, because the transaction out of which the sum was derived was a mere disposal of part of its capital by the appellant.

A number of cases were cited to me by counsel for the appellant in support of his submission. Whilst a number of principles can be deduced from these cases, no serious attempts were made to show how and why the finding by the Special Commissioners is wrong. Facts in those cited cases are not identical with those in the present appeal. This appeal certainly raises no point of law at all, but rather concerns the application of existing principles to particular facts as found by the Special Commissioners. Unless it is shown that their finding is perverse and unsupported by evidence, the court is reluctant to interfere with it.

As a matter of principle any gain received from the sale of assets is not assessable, if the transaction out of which the gain is derived is not an adventure in the nature of trade. Such gain is known as capital gain or capital receipt and the assets disposed of known as capital and the sale transaction for which the receipt is obtained is referred to as a capital transaction or disposal of assets. On the other hand a gain is assessable if the transaction in which the assets are sold is an adventure in the nature of trade. In this circumstance the gain is called the revenue receipt or income, the assets sold known as stock-in-trade, and the transaction as business or an adventure in the nature of trade. Further in order to determine whether a gain in question is a capital receipt or revenue receipt, it is necessary to examine the nature of the assets and the transactions relating thereto and in particular the circumstances of its acquisition and sale, the objects for which the appellant is incorporated and the nature of business carried on by it and the activities of the appellant as regards the assets in question. A number of cases were decided on the intention and purpose of acquisition of the assets. Thus where the assets were acquired not for investment but for the purpose of business of the taxpayer, the gain derived from the subsequent sale is not a capital gain, but a revenue receipt and therefore taxable. For this purpose the determination of the taxpayer's business and purpose of acquisition and sale of assets is therefore essential.

In the present appeal the Special Commissioners found that the purpose of the appellant's acquiring the land was two fold, namely, to sell timber logs and equally to plant oil palms. It is on this basic finding that they concluded that the sale of timber logs to Koh Tong Leong Sdn. Bhd. was a business transaction and as such the appellant was carrying on a concern in the nature of trade. Unless it is shown that there is no evidence on which the Commissioners could make such finding I am completely powerless to interfere with their finding and order.

In arriving at this finding and conclusion, they rejected the following contentions by the appellant, i.e.

(i) that what was sold was timber rights because extraction of logs was done at the expense of the buyer, Koh Tong Leong, the purpose of sale being to prepare land for oil palm planting;

(ii) that the extraction of timber logs was done in compliance with the condition of the title to the land.

As to the first contention, I am of the view that the Commissioners are correct in rejecting it. The appellant's agreement with Koh Tong Leong created an instant obligation upon the latter to cut down and

remove the timber within a specified date. There is a duty of instant removal. Therefore the right sold is not "an interest in, and possession of, land", to use the words of Lord Shaw of Dunfermline in *Kauri Timber Co. Ltd.* v. *Commissioner of Taxes.*[1] (See also my decision in *Sekong Rubber Estate* v. *Ketua Pengarah Hasil Dalam Negeri*[2]). Preamble (b) to the agreement said that the buyer agreed to buy

"all the logs, including hardwood, ... extracted at the buyer's own expense from the said land and to remove the same from the said land for processing etc.... within the periods specified hereunder and in the consideration subject to the terms and conditions as hereunder."

Clause 1 of the agreement speaks of the sum of $540,000 as "the purchase price for all the timber logs extracted from the said land". Under the same clause the buyer had to fell saw cut and transport the logs at its own expenses and to pay all timber royalty to the Forest Department. The logging operation according to clause 4 had to be completed within 3 years according to the schedule of work contained therein. It is clear therefore that what was sold was only such logs as the buyer could fell and remove within the period of 3 years for a total consideration of $540,000 to be paid progressively according to agreed schedule of payment. The area was never leased out to the buyer so that it could have the choice to keep and cut timber at its own time and discretion. There is no clause which expressly gives possession of the land to the buyer, but under clause 5 the buyer had the right to enter the land for the purpose of logging operations for as long as it was required to complete them — i.e. 3 years. On the face of this agreement I cannot see how counsel for the appellant could maintain that what was sold was not logs but proprietary rights in timber, a sort of interest in, and possession of, land. As long as the trees stand on the ground, they are part of the land and the property in the timber remains with the appellant. But as soon as they are felled and severed from the ground and cut or sawn into logs at that moment of conversion they cease to be the property of the appellant, but became that of the buyer. It is at this moment that the sale took place, because under the agreement what the appellant sold were logs. There is no merit at all in the submission of the counsel for the appellant and the Commissioners are therefore justified in rejecting it and refering to the agreement of the appellant with Koh Tong Leong as one for "the purchase and sale of severed timber logs and not of timber rights."

In the course of his submission, counsel for the appellant referred me to my judgment in *Sekong Rubber Co. Ltd.* v. *Director-General of Inland Revenue, supra,* in which I said that where the vendor is not a timber merchant, the sale of standing timber, though to a timber-merchant and though it has to be cut, felled and removed within a specified time limit, such sale is a disposal of capital assets of the vendor and therefore no tax is assessable on the proceeds of the sale. Counsel therefore submitted that since the appellant is not a timber-merchant, the proceeds of sale of the extracted logs being gain derived from sale of capital are not assessable. This is an over simplification of my judgment. The relevant statement I made in *Sekong Rubber Co.'s* case is in connection with *Thomson* v. *Deputy Federal Commissioners of Taxation,*[3] which seems to be irreconcilable with a number of other authorities, i.e. *Kauri Timber Co. Ltd.* v. *Commissioners of Taxes, supra; Hood Bros.* v. *C.I.R.;*[4] *Murray* v. *C.I.R.*[5] and *Hopwood* v. *Spencer.*[6] Finally I concluded that: —

"*Thomson's* case therefore stands on its own footing and under its own peculiar circumstances. The transaction was not an adventure in the nature of trade because the tax-payer unlike the cases cited above, was not a timber merchant, but a cattle grazer and the land was acquired not for the purpose of growing or cutting timber but for grazing cattle."

In the present appeal the Special Commissioners found as a fact that the land was acquired for the purpose of selling timber logs though also for planting oil palms. This case is different from *Thomson's* case where a cattle grazer acquired the land with standing timber thereon for purpose of grazing his cattle, and subsequently sold the timber after the land had ceased to be used for cattle grazing. Hence I cannot see how counsel for the appellant could maintain that the timber sold was capital assets. The main point is the purpose of acquisition. If the Commissioners' finding had been that the land was not acquired for selling timber, the submission would have been correctly made. I therefore hold that there is no merit in this submission.

As regards the second contention of the appellant which was rejected by the Commissioners, it is necessary to examine the evidence. At the time when the first agreement was entered into on March 5, 1973, the appellant, on whose behalf Negeri Sembilan Oil Palms Berhad acted in the agreement, certainly knew the interest of YAM Tengku Ibrahim in that the land was divided into two big compartments — 7,000 acres being the part logged by YAM Tengku Ibrahim and the 3,000 acres still virgin jungle. It must have been due to this fact that clause 7 of the agreement was inserted so that YAM Tengku Ibrahim had to stop logging operations forthwith. Under the third agreement for a further consideration of $500,000, the appellant secured a right of requiring the present H.H. the Sultan to obtain a KSK forest licence covering 6,976 acres of the same land; the purpose being to enable the appellant "to carry out extraction of logs the sale proceeds of which shall be retained by the (appellant)", and another licence covering the remaining area for 3,024 acres "to enable the (appellant) to extract logs over the said area over a period of 2 to 3 years". From this clause it is clear that ever since the first sale agreement took place on March 5, 1973 the appellant was interested in the timber and that it itself intended to operate the logging operations. The fact that the express condition of title imposed in 1976 required all timber of commercial value to be extracted according to an approved schedule and with permit of the State Forest Officer is neither here nor there. The extraction of timber from the land can under no circumstances be said to have been carried out because of this express condition. It is rather the result of the appellant's own appreciation of the value of timber which it could recover, and its intention to operate as a timber logger, although in extracting it the term of the express condition was being compiled with. The State Government recognized, just as the appellant did, that the timber standing on land was a good

source of revenue, and so imposed the condition so that it could earn some revenue by way of royalty. The interests and benefits of the state or the appellant were therefore mutual. In my view the Commissioners were right in rejecting the contention of the appellant.

The finding of the Commissioners is based on the following four facts: —

(1) the appellant had taken into account of the existence of timber trees which had commercial value when he decided to purchase the land;

(2) the appellant was aware that logging activities were being carried on;

(3) when the appellant decided to buy the land, it made a provision in the sale agreement for the logging operations, then being carried on by YAM Tengku Ibrahim, to be stopped; and

(4) the appellant itself intended to operate as loggers.

The first three facts can be gathered from the first sale agreement on March 5, 1973 (see preamble 4 and clause 7); whilst the fourth fact is supported by the third sale agreement dated January 12, 1975 (see clause 2) which required the present H.H. the Sultan for a further consideration of $500,000 to assist in getting forest licences to enable the appellant "to carry out extraction of logs — the sale proceeds of which shall be retained by (it)". The fact that the appellant was not issued with any licence is immaterial, because the appellant sold the logging right to Koh Tong Leong Sdn. Bhd. which carried on the logging operations under the licences issued in the name of the present H.H. the Sultan. Since the appellant itself did not carry on the logging operations, it seems unnecessary to have the licences issued in its own name, nor was it necessary for it to have any licence at all.

Further a close study of the three sale agreements reveals no clue that the land was purchased by the appellant for the purpose of planting oil palms. The long recitals in the preambles of these agreements say nothing about the planting of oil palm. This silence is in contrast to the express mention of the timber rights in preamble 7 and clause 7 of the first agreement and timber licences in clause 2 of the third agreement. Apart from the fact and the Negeri Sembilan Oil Palms Berhad and the appellant which purchased the land are both plantation companies and the express condition of title to the land issued on April 19, 1976, requiring the land to be planted with oil palms there is really nothing in any of the sale agreements to show that the appellant purchased the land for an oil palm estate. This does not mean that the Special Commissioners' finding on this is wrong but shows that logging operations were uppermost in the minds of the appellant and the more prominent purpose than planting oil palms.

In view of the above circumstances I am of the opinion that the Commissioners are correct in coming to their conclusion that the purpose of the appellant's acquiring the land was to sell timber logs and to plant oil palms. The sale of timber logs is thus an adventure in the nature of trade, and the gain derived from the transaction is not a capital receipt but a revenue receipt subject to taxation.

I now turn to the last submission of counsel for the appellant. He submitted to the Special Commissioners that if the proceeds of the sale of timber logs were held to be revenue receipt, the appellant should be entitled to deduct from it the price which it paid for the land. The Special Commissioners rejected this submission and held that the price of land was not revenue expenditure which could be debited against revenue receipt in order to arrive at the taxable profit, but a capital expenditure which is represented by the assets, i.e. land. In my view, the decision of the Commissioners is correct. Take for example, the case of a person who purchased a house. The price he paid for it is certainly a capital expenditure, unless he purchased it as a trader dealing in buying and selling houses. If he let out the house, the rental he received is a revenue receipt, and under no circumstances would such rental be reduced or set off by the price of the house or any part of it. In the present appeal, the appellant is asking just that, i.e. the deduction of capital expenditure from revenue receipt. It would have been different if the appellant had purchased the land with a view to reselling it. In that event the price paid for the land would be a revenue expenditure and therefore deductable. But the fact found by the Special Commissioners is that the appellant acquired the land for turning it into an oil palm estate, i.e. for investment. That being the case, no part of capital expenditure can be deducted from the revenue receipt.

Before me counsel for the appellant modified his submission in that the deductable amount should be the sum equal to the proceeds of the sale of timber, i.e. $540,000. He submitted that this equivalent amount represents the value of standing timber at the time when the appellant purchased the land. In my judgment this contention is completely without any basis at all either in fact or in law. The question is whether deduction can be made at all of the whole or part of the purchase price of the land. Only revenue expenditure can be deducted from revenue receipt. I agree with the Special Commissioners that the purchase price of the land in this case is not a revenue expenditure and therefore not deductable. The appellant, like Mr. Pilcher the fruitgrower and fruit seller in *C.I.R.* v. *Pilcher*,[7] did not buy the land and the timber separately so that one could say how much it paid for the land and how much for the timber. Just as Mr. Pilcher purchased a cherry orchard inclusive of cherry fruit that could be gathered and sold, so did the appellant in the present appeal purchase a large area of jungle land with standing timber which could be extracted and logged. At least in *Pilcher's* case, the taxpayer had made an estimate of the value of the fruit before purchasing the orchard, and despite such estimation it was still held that this estimated amount could not be debited against the proceeds of the subsequent sale of the fruit, because Mr. Pilcher did not buy the fruit separately from the land. In the present appeal no such estimate of the value of the timber at all was made before purchasing the land and even if it were made, it is of no consequence because the timber was not purchased separately. The timber standing on the land is part of the land, and when felled, the resulting logs became the product of

the land and when sold the proceeds became the revenue derived from the land, and therefore taxable. From such revenue no deduction can be made in respect of the price of land or part of it. In my view the Special Commissioners' ruling on this submission is correct.

I therefore dismiss the appeal with costs.

From the above judgment the appellant appealed to the Federal Court.

FEDERAL COURT.

J. Puthucheary for the appellant.

Mokhtar bin Haji Sidin (Senior Federal Counsel) (*Jamil Hajar,* Federal Counsel with him) for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): The appellant is a trading company incorporated as a public company in 1968 with the objects, *inter alia,* to carry on business of planters of agricultural produce, cultivators ... buyers of rubber ... and to work and deal with ... timber and so forth.

An associate of the appellant company called N.S. Oil Palm Bhd. (we shall call N.S. Oil) agreed on March 5, 1973 (we call 1st agreement) to purchase a piece of land of about 10,000 acres in Keratong area Pahang from the late Sultan of Pahang. The land was on a 99 year lease. One of the restrictive conditions was that the land could not be charged, sold or transferred or be subject to any dealings without the permission of the Authority of Pahang Government.

N.S. Oil entered into a supplementary agreement (we call 2nd agreement) on June 11, 1973 whereby it was agreed that the land in question would be transferred directly to the appellant on issue of title deed by the Government.

On January 12, 1975 an agreement (we call 3rd agreement) was entered into between D.Y.M.M. Tengku Ahmad Shah, as successor of Pahang Sultanate and the appellant. The 1st party agreed to perform the terms and obligations imposed on his late father by the 1st and 2nd agreements. He undertook to obtain from the State Forest Officer Pahang a KSK (Kawasan Sudah Kerja) licence covering an area of 6,976 acres. He also undertook to obtain a licence for the remaining area (3,024 acres) of virgin jungle land to enable the appellant to carry out extraction of timber logs therefrom within a period of 2-3 years.

Under the three agreements the appellant purchased 10,000 acres of jungle land with valuable timber for a total consideration of $1,800,000 and the appellant became registered owner on July 2, 1976.

The 1st agreement was signed by both the late Sultan and his son Tengku Ibrahim on the one part and the N.S. Oil on the other part. Tengku Ibrahim was a signatory to the agreement because the late Sultan on receiving alienation from the Government by an agreement dated November 11, 1968 transferred all rights and interests in respect of 7,000 acres to Tengku Ibrahim retaining for himself 3,000. Tengku Ibrahim carried on logging operations and by the time the 1st agreement was entered into the total area he had worked was 6,976 acres. The 1st agreement required Tengku Ibrahim to stop logging forthwith. He was however given the right to remove logs felled prior to the date of the agreement.

The 2nd agreement was entered into 3 months after the 1st agreement, also between the same parties.

Under the 3rd agreement the appellant acted as principal purchaser, on whose behalf and for whose benefits the 1st and 2nd agreements were entered into by N.S. Oil. In this agreement the present Sultan agreed to comply with the earlier agreements and to facilitate in the issuing of two forest licences (a) the KSK licence in respect of 6,976 acres to enable the appellant to carry out extraction of logs and to retain the proceeds of sale and (b) another licence in respect of 3,024 acres of virgin forest also to enable the appellant to extract logs in the area over a period of 2 or 3 years.

Forest licence was never issued to the appellant. In respect of 6,976 acres licence was issued on July 1, 1975 in the name of the present Sultan. The appellant did not itself extract the logs but sold them for a sum of $540,000 to Koh Tong Leong Sdn. Bhd. under a sale agreement signed on June 16, 1975. All the logs in the area were to be cut and removed from the area at the expense of Koh Tong Leong the buyer.

Qualified Title for the land, an area of approximately 10,000 acres, was issued to the present Sultan and Tengku Abdullah as representatives on July 2, 1976 on a 99 year lease with effect from April 19, 1976 subject to the following express conditions: —

"(1) Tanah yang diberi milik ini ialah semata-mata untuk tanaman Kelapa Sawit.

(2) Pokok-pokok kelapa sawit hendaklah ditanam diatas tanah yang diberi milik ini menurut jadual yang telah diluluskan dalam Rompin: 3363 dan mistilah kemudiannya dipelihara dengan memberi puas hati Pegawai Pertanian Negeri, Pahang.

(3) Segala kayu-kayu yang berharga diatas tanah yang diberi milik ini mistilah dikeluarkan terlebeh dahulu mengikut jadual yang telah ditetapkan dan dengan kebenaran bertulis daripada Pegawai Hutan Negeri, Pahang."

These briefly are the essential facts and they are largely not in dispute.

The appellant was assessed with income tax in respect of $540,000 proceeds of the sale of timber logs in the 6,976 KSK area. On appeal before the Special Commissioners, they found the dominant purpose of the appellant's purchases of land was to sell timber and to plant oil palms. They held that the proceeds of sale of timber are gains derived from an adventure in the nature of trade and thus assessable.

It was the conclusion of the Special Commissioners that the sale of timber logs to Koh Tong Leong was a business transaction and as such the appellant was carrying on a concern in the nature of trade.

The learned judge accepted the Special Commissioners' finding and it was his view that, and we quote: "The appellant's agreement with Koh Tong Leong created an instant obligation upon the latter to cut down and remove the timber within a specified date.

There is a duty of instant removal. Therefore the right sold is not an interest in, and possession of, land, to use the words of Lord Shaw of Dunfermline in *Kauri Timber Co. Ltd.* v. *Commissioner of Taxes.*"[1] He rejected the appellant's contention that what was sold was not logs but proprietory rights in timber, a sort of interest in, and possession of land.

The learned judge also rejected the appellant's contention that the timber sold was capital assets. He formed the view that the main point here is the purpose of acquisition. The learned judge found that ever since the first agreement took place on March 5, 1973, the appellant was interested in the timber and that itself intended to operate the logging operations. He further found that the logging operations were uppermost in the minds of the appellant and more prominent purpose than planting oil palms.

The appeal before us is founded upon the grounds that the learned judge erred in law in holding

(a) that the more prominent purpose of acquisition of the land was logging and not the planting of oil palm;

(b) that the sale of timber rights by the appellant was not a sale of its capital assets;

(c) that what the appellant sold were logs and not the right to extract timber; and

(d) that the sale only took place after the timber was severed.

In the alternate it is the appellant's contention that the judge erred in law in not allowing $500,000 paid to the Sultan of Pahang as exclusively in the production of the income of $540,000.

In the course of the judgment the learned judge made certain observations which we think are pertinent and with which we respectfully agree, in particular when he said that the facts in those cases cited to him are not identical with those in the present case and that the present case concerns essentially the application of existing principles to particular facts as found by the Special Commissioners.

Mr. Puthucheary counsel for the appellant referred to the first, second and third agreements and submitted that clause 7 in the 1st agreement refers to the extraction of timber. There is no reference whatever to logging in the 2nd agreement. As for the 3rd agreement, although it deals mainly with matters related to timber operations, it is argued that whether logging or not licence is required to remove timber. It is also argued that timber is only ancillary to the planting of oil palm. One may have many ancillary purposes but the court should only be concerned with dominant purpose and selling timber was not a dominant purpose.

Outlining the principles deduced from the cases cited to him, the learned judge succinctly stated that

"A number of cases were cited to me by counsel for the appellant in support of his submission. Whilst a number of principles can be deduced from these cases, no serious attempts were made to show how and why the finding by the Special Commissioners is wrong. Facts in those cited cases are not identical with those in the present appeal. This appeal certainly raises no point in law at all, but rather concerns the application of existing principles to particular facts as found by the Special Commissioners. Unless it is shown that their finding is perverse and unsupported by evidence, the court is reluctant to interfere with it.

As a matter of principle any gain received from the sale of assets is not assessable, if the transaction out of which the gain is derived is not an adventure in the nature of trade. Such gain is known as capital gain or capital receipt and the assets disposed of known as capital and the sale transaction for which the receipt is obtained is referred to as a capital transaction or disposal of assets. On the other hand a gain is assessable if the transaction in which the assets are sold is an adventure in the nature of trade. In this circumstance the gain is called the revenue receipt or income, the assets sold known as stock-in-trade, and the transaction as business or an adventure in the nature of trade. Further in order to determine whether a gain in question is a capital receipt or revenue receipt, it is necessary to examine the nature of the assets and the transactions relating thereto and in particular the circumstances of its acquisition and sale, the objects for which the appellant is incorporated and the nature of business carried on by it and the activities of the appellant as regards the assets in question. A number of cases were decided on the intention and purpose of acquisition of the assets. Thus where the assets were acquired not for investment but for the purpose of business of the taxpayer, the gain derived from the subsequent sale is not a capital gain, but a revenue receipt and therefore taxable. For this purpose the determination of the taxpayer's business and purpose of acquisition and sale of assets is therefore essential."

We now turn to the grounds of appeal relied upon by the appellant. The first ground is essentially a question of fact. Salleh Abas F.J. examined in great detail the facts found by the Special Commissioners to determine whether they were correct in concluding that the purpose of the appellant acquiring the land was to sell timber logs and to plant oil palms. We do not think there is merit in the appellant's contention that the learned judge erred in law when he held that the more prominent purpose of acquisition of the land was logging and not the planting of oil palms. What the learned judge said should not, we think, be read in isolation but in the context of his assessment of the Special Commissioners' conclusion as to the purpose of the appellant's acquisition of the land. What the learned judge did say after a review of the evidence, particularly in the light of the four facts which formed the basis of the Special Commissioners' findings, was that "logging operations were uppermost in the minds of the appellant and more prominent purpose than planting of oil palm." We see nothing wrong in that, indeed, we are by no means satisfied that he came to an erroneous conclusion. He neither introduced anything new nor made any finding inconsistent with or contradictory to any finding of fact of the Special Commissioners. There is therefore no reason whatever for us to say that there was error either in law or fact.

Counsel for the appellant cited a number of authorities to us, one of them is the *River Estates Sdn. Bhd.* v. *Director-General of Inland Revenue.*[8] The facts in that case are entirely different from the facts of the present case. The question that arose for consideration there was whether the appellant company's timber and plantation operations constituted a single integral business or two distinct sources or businesses. The appellant company's principal objects, *inter alia,* were the acquisition of any rubber, coffee, cocoa, coconuts or other plantations and the carrying out of the business of planters, growers and manufacturers

of rubber and so forth. The facts revealed that the appellant company was carrying on plantation operations in some estates and timber operations in other estates. It was held in that case that "the company carried out two main categories of business namely plantation activities and timber operations and there were therefore two separate businesses deriving income from the five estates or sources." In consideration we see no substance in the appellant's argument that the conclusion arrived at by the Special Commissioners were not warranted by the evidence or that the Commissioners had no evidence to infer that the land purchased was for selling timber and for planting oil palm. In any event it is not the function of an appeal court to substitute its conclusions of fact for those of the Special Commissioners whose duty it is to determine the facts unless we are satisfied that they are wrong.

Counsel urged us to accept the appellant's contention that one may have ancillary purposes. He submitted that what the court should be concerned with is the dominant purpose and in the instant case the selling of timber was not a dominant purpose. *Evans* v. *The Deputy Federal Commissioner of Taxation for South Australia*[9] was cited in support of the appellant's contention. We however fail to see how this case could be relevant to the issues before us, particularly in the light of the Special Commissioners' finding that the purpose of the appellant's purchase of land was to sell timber logs and for planting of oil palm and of their conclusion of law upon such finding that the process of sale of timber were gains derived from an adventure in the nature of trade or as the learned judge described it and we quote "the gain derived from the transaction is not a capital receipt but a revenue receipt." Hence the taxation.

Grounds (b), (c) and (d) may conveniently be dealt with together. What we have stated earlier would also be relevant to our consideration of these grounds. In a nutshell, the appellant's contention is that what is of distinctive importance is that the appellant purchased land and all on land (i.e. timber) and this was capital assets, and when the appellant sold the rights to extract timber, these were rights to go into the land to extract commercial timber. Such rights were incidence of ownership as they did not buy timber separately but instead they bought land and by so doing the appellant had the right to dispose or to sell timber and cannot therefore be said to be an adventure in the nature of trade. It is argued that the Commissioners should have determined that the right passed.

We must first of all stress that the Commissioners proceeded rightly to determine what essentially was a question of fact and upon such premises formed a conclusion of law. Salleh Abas F.J. quite rightly said that unless the Commissioners' finding is perverse and is not supported by evidence, the court is reluctant to interfere with it. Quite appropriately the learned judge observed that the appeal before him raised no point of law at all but rather concerned the application of existing principles to particular facts as found by the Special Commissioners.

Cases have been cited to us to support the appellant's contention. The learned judge in the court below referred to *Kauri's* case, *supra*.

The facts of that case clearly reveal a distinction that can be drawn viewed in the light of the Special Commissioners' finding, endorsed by the learned judge, that the right sold was not an interest in and possession of land. The right sold by the appellant indeed that which was acquired by Koh Tong Leong was the right of a buyer of such logs he could fell or sever and remove within a specified period for a total consideration of $540,000 to be paid progressively according to agreed schedule of payment. There was no question of any lease of the area to the buyer and no question of possession of the land not even proprietary rights in timber which can be described as a sort of interest in and possession of land. It was plain and simple a sale of timber transaction which was in fact an adventure in the nature of trade. There was therefore no question of a disposal of any part or at all of capital assets. And consequently the question of proceeds being capital receipt cannot arise.

James Jones & Sons, Limited v. *Earl of Tankerville*[10] cited to us in support of the appellant's proposition that the right disposed of was that in the nature of land is certainly not borne out by the facts of that case and, more importantly, by the issues that arose for consideration therein. The reference to "legal property" seems to have no bearing whatsoever to any legal or proprietary right in the nature of interest in and possession of land.

It may perhaps be pertinent to refer to the case of *Whitfords Beach Pty. Ltd.* v. *Federal Commissioner of Taxation,*[11] a judgment of the Federal Court of Australia where in the course of the judgment Brennan J. at page 644/5, speaking of "business" said that "business in the relevant sense of necessity involves the earning of or the intention to earn profits." He pointed out with reference to *White's* case as follows: —

> "In that case, the proceeds of the sale of timber growing on land acquired as a capital asset were held to be taxable because the owner committed the land to a business of timber production and sale in which he was engaged (see *White's case, supra* at 120 C.L.R. 209, 210, 216, 223; 10 A.I.T.R. 649, 650, 712, 716). The land became devoted exclusively and indefinitely to the sale of standing timber as it stood from time to time (at 223; 716). In *White's case,* the sale and harvesting of a stand of timber left the land on which it stood available for growing new timber, and the sales of timber in the course of carrying on the business did not exhaust the capital asset ventured in it. The capital asset was by nature regenerating, yielding its produce for sale in a continuing business. In the present case, however, the moneys which are said to bear the character of income are the proceeds of the sale of the taxpayer's land itself, not of its severable produce."

For reasons that we have stated it is our judgment that these grounds show no substance to warrant our interference.

We now turn to the final ground submitted by the appellant. It is essentially a question of law which entails the construction of section 39(1)(g) Income Tax Act, 1967. The issue arises in connection with the sum of $500,000 paid for licence under the 2nd and 3rd agreements. It is the respondent's contention that the appellant has not shown how this sum should be allowed. In any event it is pointed out that the

payment was not made for production of income. Section 39(1)(g) reads:

"39. (1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of —

....

(g) any sum, by whatever name called, payable (otherwise than to a State Government) or with the approval of the Minister, a statutory authority, or other body the capital or fund of which is wholly or substantially owned by a State Government or a statutory authority for the use of a licence or permit to extract timber from a forest in Malaysia;"

The effect of section 39(1)(g) was considered in the case of *Director-General of Inland Revenue* v. *Lahad Datu Timber Sdn. Bhd.*[12] where it is shown that sums paid for the use of the licence or permit to extract timber within the meaning of section 39(1)(g) should not be allowed as deductions. Reference was made to *Director-General of Inland Revenue* v. *L.T.S.*[13] where it is held that this section is to be construed to mean that sums paid by the taxpayer to permit holders is caught by subsection (1)(g) of section 39 and is therefore not deductable.

See also the case of *Lahad Datu Timber Sendirian Berhad* v. *The Director-General of Inland Revenue*[14] where Lord Russell of Killowen delivering the judgment of the Board had this to say at page 6:

"The second question is whether the three items disallowed as deductions by the Special Commissioners come within section 39(1)(g) of the Act 53. They have already been described. They appear to their Lordships to fall squarely within the description of sums payable for the use of a licence or permit to extract timber, within that statutory provision."

Our view of the present case is that the appellant cannot successfully argue that such sum was not payment for the use of a licence or permit to extract timber within the meaning of section 39(1)(g) of the Income Tax Act, 1967.

For these reasons, we dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

BALAKRISHNAN v. KETUA PENGARAH PERKHIDMATAN AWAM MALAYSIA AND THE GOVERNMENT OF MALAYSIA

[F.C. (Raja Azlan Shah Ag. L.P., Abdul Hamid F.J. & Abdoolcader J.) May 27 & July 21, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 234 of 1980]

Administrative Law — Declaration — Termination of service in public interest — Application to declare such termination void and inoperative — Public officer called upon to give explanation under General Order 8 — Action subsequently taken to terminate his services in public interest under General Order 44 — Action taken by Government — General Orders 8, 27, 30 & 44 — Pensions Ordinance, 1951, s. 10(d) — Federal Constitution, art. 144(5B).

Constitutional Law — Public Services — Disciplinary Authority — Disciplinary Board appointed — Public Service Commission cannot exercise powers entrusted to Disciplinary Boards — Power of Yang di Pertuan Agong — Exercised by the Government — General Orders 8, 27, 30 & 44 — Public Services Disciplinary Board Regulations, 1967 — Pensions Ordinance, 1951, s. 10(d) — Federal Constitution, art. 144(5B).

In this case the appellant had been charged with attempted corruption but was acquitted. Subsequently the Public Services Commission wrote to the appellant stating that from a report from the Director-General of Road Transport he appeared to be in control of pecuniary resources and property disproportionate to his official emoluments and known private means and requiring him to submit an explanation. The appellant submitted his explanation and was told that the explanation had been considered. Subsequently the first respondent, the Director of Public Services, informed the appellant that the Government had decided to terminate his service in the public interest under section 10(d) of the Pension Ordinance and G.O. 44. The appellant brought an action for a declaration that the termination of his service in the public interest was void, inoperative and of no effect. The action was dismissed in the High Court and the appellant appealed.

Held: (1) in this case the Disciplinary Authority was the Public Services Disciplinary Board and by virtue of the explicit provisions of Article 144(5B)(iv) of the Constitution the Public Service Commission was precluded from acting as it purported to do under G.O. 8;

(2) G.O. 44 goes beyond and is additional to what precedes it and recourse to its provisions is not *per se* an act of caprice or bad faith;

(3) G.O. 44 does not make the calling of a report from the head of department mandatory and imperative but only directory and discretionary and in any event in this case there was a report from the Director-General of Inland Transport;

(4) it was for the Government to determine the question of public interest and on the evidence disclosed in this case there was sufficient material for the Government's decision on the question of public interest and it had not been established that it was made without justification or evinced any lack of good faith;

(5) the termination of the appellant's services was properly effected under G.O. 44 in the public interest and it was not a convoluted process to disguise a dismissal and there was no abuse of power or *mala fides* in the proceedings;

(6) the reference to the Government in the letter of the Director of Public Services is sufficiently comprehensive to manifest the Yang di-Pertuan Agong's participation in the decision made. It is not correct therefore to argue that the Yang di-Pertuan Agong did not in fact require the appellant to retire from the public service on the termination of his employment in the public interest under section 10(d) of the Pensions Ordinance.

Cases referred to:-

(1) *Westminister Bank Ltd.* v. *Minister of Housing and Local Government* [1971] A.C. 508.

(2) *Yeap Hock Seng alias Ah Seng* v. *Minister for Home Affairs, Malaysia & Ors.* [1975] 2 M.L.J. 279.

(3) *Najar Singh* v. *Government of Malaysia & Anor.* [1976] 1 M.L.J. 203.